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Transatlantic Merger Relations: The Pursuit of Cooperation and Convergence

Chad Damro (University of Edinburgh, UK, chad.damro@ed.ac.uk) and
Terrence Guay (Pennsylvania State University, USA, trguay@psu.edu)

ABSTRACT

The European Union (EU) and United States (US) are the world's two largest and most influential legal jurisdictions for corporate mergers and acquisitions (M&A). The pressures of international economic competition have led to a flurry of M&A activity in these locales in the post-Cold War period. Given the economic impact and, in many cases, political sensitivity of some M&As, it has become critical that transatlantic regulators reach similar decisions with regard to M&A approval, denial, or modification. Incongruent decisions lead to uncertainty in the marketplace, and the possible loss of global economic competitiveness and respect for regulatory processes and outcomes. In this paper, we explore the efforts made by the US and EU over the past two decades to enhance cooperation in merger policies and processes. We argue that, despite a couple of high-profile cases to the contrary, the US and EU have made great strides in reducing uncertainty in the M&A regulatory process by institutionalizing a series of formal agreements and working groups that have served to provide the foundation for a transatlantic merger environment that may serve as a model for cross-border regulatory cooperation in the 21st century.

Key Words: Antitrust; Competition Policy; Cooperation; European Union; Interdependence; Merger; Regulation

Introduction

Since the late 19th century, the gradual proliferation of national competition policies reflects the emergence and maturation of free market economies throughout the world. These competition policies—broadly including merger review, cartel and monopoly policies, and state aids—operate as regulatory tools to prevent anticompetitive business activity from undermining the benefits of competition in a domestic free market economy. However, as economies become global and interdependent, the implementation of competition policy is no longer simply a within-the-border matter of regulating domestic business activity.

The European Union's (EU) active involvement in high-profile, cross-border merger cases raises questions about the EU's approach and decision-making in the regulation of business activity that is becoming increasingly international. This article provides an investigation of the EU's external merger relations with another large and influential economy, the United States of America (US). While transatlantic merger relations are not wholly without disputes, a review of merger cases since the launch of the EU's single market in January 1993 suggests that the relationship is not trending toward increasing conflict, as is often portrayed in the media.ⁱ Rather this article argues that the two most prominent trends in the relationship since the 1990s are cooperation and convergence. Cooperation is viewed herein as increasing coordination (largely via consultation and information exchanges) while convergence is understood to be increasingly reaching similar decisions on individual competition cases as well as increasing the similarity of procedural approaches and substantive rules in both jurisdictions. Thus, while cooperation and convergence may be mutually reinforcing, they are not identical phenomena.

To explain the development of transatlantic merger relations, we consider the influence of economic interdependence as a significant factor that expands markets and changes business activity. As businesses—through the expansion of trade and investment—increasingly operate and merge across borders, so too does the need increase for regulators in different jurisdictions to review and approve, modify, or reject cross-border mergers. This pressure of interdependence, and particularly the trade and investment flows by European and US companies into each other's home markets, led to

the signing of the 1991 EU-US Bilateral Competition Agreement, which formalised the transatlantic cooperative framework for merger review.

However, in 1997, the Boeing-McDonnell Douglas (BMD) merger dispute became the first major challenge to the transatlantic cooperative framework. The lessons from this case helped to shape the subsequent transatlantic approach to merger relations, an interactive process largely undertaken by the competition regulators themselves. Today's framework is notable for the various ways in which the EU and US exchange information and coordinate their investigations throughout the review process. In addition to this increasing cooperation, transatlantic merger relations also display evidence of convergent decisions in individual merger cases, as well as procedural convergence in areas under the discretionary authority of the competition regulators.

The article proceeds in the following manner. The next section discusses the influence of interdependence on EU-US merger relations and identifies the prominent trends—cooperation and convergence—in this relationship. The article then investigates the formal developments through which the EU and US have pursued cooperation in transatlantic merger relations. This section also discusses the role of the BMD merger in this cooperative process, serving as a spur to nudge regulators to improve cooperation so as to avoid similar disputes going forward. The article then turns to a discussion of the ways in which the competition authorities cooperate and pursue convergence across the four stages of merger review. This section introduces preliminary evidence of convergence and argues that these changes are taking place primarily under the discretionary authority of the regulators. The article concludes with a summary of the findings and suggestions for further research.

Transatlantic Merger Review and the Pressure of Economic Interdependence

Transatlantic efforts to cooperate in merger review help to meet an external challenge—economic interdependence—to domestic competition policy. In a globalizing environment, businesses rapidly internationalize their activities and competition authorities find that internationally-oriented merger activity increasingly threatens to outpace their legal and administrative resources to enforce domestic competition policy. Because economic interdependence increases the number of internationally-oriented

mergers, it also increases the potential for divergent regulatory decisions by EU and US competition authorities when they review the same merger.

Economic interdependence challenges conventional notions of jurisdiction based on sovereign territory (Keohane and Nye: 1989). More specifically, it changes the context in which regulators act by increasing their need to enforce competition policy on firms that may not be based in their domestic jurisdiction. John Parisi, Counsel for European Union Affairs in the International Antitrust Division of the FTC, succinctly explained the nature of the problem:

As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and have led antitrust authorities in the affected jurisdictions to communicate, co-operate, and co-ordinate their efforts to achieve compatible enforcement results (1999: 133).

The challenges of economic interdependence and the responses needed are clear to competition regulators who wish to avoid political intervention in their review of mergers (Damro 2006: 82-83; European Commission 2001: ICPAC 2000: 63). This preference, which is shared by competition officials in both the EU and US, is reflected in the desire to achieve compatible enforcement results (i.e., convergent decisions) in individual cases that are investigated simultaneously. Such claims benefit from further clarification of the precise reasons why, in an interdependent environment, EU and US competition authorities will choose to pursue cooperation and convergence.

First, competition authorities will seek to increase cooperation in order to *increase information acquisition*. As Devuyst argues, “information central to the [competition] investigation is often located outside the jurisdiction of the competition authority... Without the necessary proof, competition authorities are unable to take remedial action” (2000: 323). In an interdependent environment, the problems created by information asymmetries in cross-border merger cases present real challenges to the effective enforcement of domestic competition policy.

The centrality of information provides merging firms with an opening to influence cooperation. Domestic EU and US laws create this opening by providing for the protection of confidential business information in the merger review process. If firms do not waive their rights to confidentiality in merger cases, cooperative analyses can be seriously hindered. Citing the obstacles created by domestic confidentiality provisions, the International Competition Policy Advisory Committee (ICPAC), formed in the late 1990s by the US Department of Justice to address 21st century global antitrust issues, argued

These laws have a particularly significant impact on the merger review process, because much of the information used to analyze a proposed transaction comes from extremely sensitive, confidential information relating to the companies' strategies, investment plans, and marketing goals and methods. It is this information that frequently proves most useful in analyzing a proposed transaction (2000: 65).

A series of transatlantic agreements on competition policy (see below) explicitly recognize and respect domestic laws protecting confidentiality. As a result, competition regulators must obtain waivers from the merging firms before sharing confidential information with their foreign counterparts. Such waivers of confidentiality have become routine in EU-US cooperation in merger review (Svetlicinii: 2006). This is so because, by waiving rights of confidentiality, firms expedite the review process and increase the likelihood of regulators reaching convergent decisions (Parisi 1999: 140). Merging firms generally prefer avoiding delays in the review process due to the time sensitivity of the transaction. Similarly, merging firms generally prefer convergent decisions on remedies (if remedies are necessary) because disagreements over such matters can delay the conclusion of the merger or undermine the strategic rationale of a proposed merger, resulting in its abandonment (Fox 2007; Morgan and McGuire 2004).

The second reason why competition authorities will cooperate internationally when implementing competition policy is to *reduce the likelihood of divergent decisions*. Regulators will strive for convergent decisions because divergent decisions are often

perceived by politicians as threats to national sovereignty and/or their domestic constituents' interests. Such decisions, therefore, can prompt political intervention (Schaub 2002: 11; Monti 2000: 2). Divergent decisions also create uncertainty for firms, since it becomes less clear how antitrust regulators may rule in future cases, thereby hindering merger activity.

Linked to this increase in convergence of decisions is also the possibility of procedural and substantive convergence. The procedural and substantive convergence of approaches is crucial because, as Charles S. Stark, Chief of the Foreign Commerce Section in the US Department of Justice's Antitrust Division, argues:

Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicions that can extend beyond the antitrust arena—as we witnessed in the Boeing/McDonnell Douglas matter (2000: 5).

Procedural convergence is linked to cooperation and information exchanges when it is understood as the increasing similarity of measures for collecting, evaluating and sharing information in individual competition cases. Likewise, substantive convergence of merger rules may affect cooperation if those rules apply to the various uses and ability to exchange information. As Devuyst argues, there is a natural link between cooperation and substantive convergence because “divergences in the laws applicable to the same set of facts may result in conflicting conclusions as to the legality of the behavior under review.... Cooperation is thus seen as necessary to reduce the likelihood of such conflicts” (2000: 323). The logic follows that as competition regulators increasingly employ similar procedures – for information exchange as well as timetables, investigative techniques, and notification procedures – and substantive rules and assessment criteria, the likelihood increases that they will reach a similar decision on the same merger case (Damro 2006, 872). An increase in such outcomes bolsters the trend of increasing cooperation.

Convergence of decisions follows directly from the activities of the competition authorities and falls largely under their discretionary authority. However, procedural and substantive convergence can be more difficult to achieve because—unless the rule in question falls exclusively under the discretionary authority of the competition regulator—they may require an adjustment to legislation by law-makers (i.e., politicians). This article will investigate below the four stages of the merger review process through which substantive and procedural convergence may occur in transatlantic merger relations.

According to Devuyst, the final reason why competition authorities will cooperate internationally when implementing competition policy is to *reduce duplication* of work (i.e., various investigative efforts). As Devuyst argues, “cooperation would help to avoid unnecessary duplication of work and costs, both for the competition authorities involved and for the businesses whose conduct is subject to review” (2000: 323). While an important motivation for international cooperation, this reason is less important in merger cases than in non-merger cases (Devuyst 2001: 140). In merger cases, some duplication of work in the review process is mandatory due to domestic law requiring each authority to act under certain circumstances. The competition regulators are not allowed to determine at their own discretion whether or not they will initiate a particular merger review. Rather, they are statutorily required to open investigations when a merger transaction meets thresholds established in domestic law. As soon as proceedings have been opened, duplication of work occurs as the competition regulators seek identical information for their respective merger reviews.

In summary, the primary motivations for competition regulators in cross-border merger relations are to increase cooperation via information exchanges and to reduce the likelihood of divergent decisions (i.e., increase convergence). Devuyst’s third reason—to reduce duplication of work—is less important in merger review due to domestic laws requiring competition regulators to review the same merger. In addition, these reasons also support the argument regarding the pressure of economic interdependence and a contention that competition regulators prefer pursuing cooperation and convergence via their discretionary authority. The next section investigates the formal agreements that provide the basis for claiming cooperation as a prominent trend in transatlantic merger review.

The Pursuit of Cooperation in Transatlantic Merger Relations

The 1991 signing of the EU-US Bilateral Competition Agreement established the basic cooperative framework between competition regulators on both sides of the Atlantic. The agreement formalized coordination, emphasized information exchanges and introduced the principle of comity. Agreeing that divergent competition decisions needed to be avoided, the central components of the agreement include:

- Notification when competition enforcement activities may affect the “important interests” (Art. 2, Para. 1) of the other party;
- Exchange of non-confidential information;
- Coordination of action;
- Conduct of enforcement activities, “insofar as possible” (Art. 4, Para. 3), that are consistent with objectives of the other party; and
- Consultation.ⁱⁱ

Under the agreement, the exchange of information can take place at multiple stages of competition investigations. In individual cases, competition authorities will notify each other when they begin reviewing a case that may affect the other’s important interests (i.e., comity). These notifications are made “far enough in advance... to enable the other Party’s views to be taken into account” (Article 2). Following such an initial notification, further cooperation can occur in the investigative and remedial stages of the case. The regulators acknowledged the constraints of their respective domestic legislation by agreeing that “Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective States or Member States” (Article IX).

Despite the 1991 Bilateral Agreement, transatlantic merger relations experienced a significant flaw in the cooperative framework in 1997. The Boeing/McDonnell Douglas (BMD) merger case provoked considerable attention because it involved a merger between two large US firms that was challenged in the EU but approved in the US. The EU’s divergent decision and the subsequent US reaction surprised many observers in Brussels and Washington and contributed to the high-profile character of the case.

However, the escalation of the case should not surprise observers because such a divergent decision by competition regulators is likely to be perceived as a threat to national and/or constituent interests and, therefore, *should* prompt political intervention. In the end, the BMD merger was particularly significant because of the escalation of political intervention and also because it served as a valuable learning experience for both EU and US competition regulators.ⁱⁱⁱ

This case began when Boeing Company and McDonnell Douglas Corporation (MDC), two US aerospace companies, announced plans to merge on December 15, 1996. In accordance with the provisions of the EU-US Bilateral Agreement, and following the receipt of formal notification from the merging firms, the EU and US competition regulators notified each other that they were both opening their own investigations into the BMD case.

Following a preliminary investigation, the Commission announced its intent to open an in-depth investigation on March 17, 1997. On May 21, the Commission issued its formal Statement of Objections, which outlined its concern that the merger would strengthen Boeing's existing dominant position. At this point, the US's Federal Trade Commission (FTC) was unable to comment on the merger because its review was still ongoing (White House 1998).

The EU's Statement of Objections included concerns over the impact of the merger on competition in the defense industry. However, following a communiqué from the US requesting comity considerations, the Commission agreed not to investigate the defense related portions of the merger. In accordance with the Bilateral Agreement, the Commission's decision reflected a determination that this aspect of the merger represented an "important interest" of the US. The fact that the EU dropped its defense related complaints suggests that the Commission calculated that including such a politically sensitive subject as defense would have increased significantly the likelihood of political intervention from the US (i.e., White House and Congress).

On July 1, it became apparent that the decisions of the EU and US competition regulators were diverging significantly. On that day, the FTC approved the BMD merger. According to the FTC's analysis, the merger would not raise significant competition concerns because MDC was no longer competitive in the commercial transport market

(Sparaco 1997: 67). In the hopes of gaining similar approval in the EU, BMD submitted a new package of remedies to the Commission. This package was rejected by the Commission.

Facing an intransigent Commission and with a final decision in the case scheduled for July 23, US politicians began to intervene in the process with threats of retaliation. Once it became clear that the EU would not approve the merger without remedies (i.e., a divergent decision), the White House intervened with President Bill Clinton stating that he might consider a complaint to the World Trade Organization or retaliatory tariffs if no resolution was reached. The US legislature also intervened in the review process. Both the House of Representatives and the Senate passed resolutions opposing EU “interference” in a US business transaction.^{iv} On July 16, the US Senate unanimously approved a resolution that condemned the EU for its intentions (Wolf 1997).

For their part, Boeing and MDC continued to resist the demands of the Commission despite a fast-approaching deadline for a final decision. Finally, facing the reality that the EU was not going to change its decision, the merging firms contacted the Commission with a solution on July 23. Boeing Chairman and CEO, Philip Condit, argued that BMD’s concessions were made due to a fear that the newly merged company would have faced “large fines and potential harm to our customers” without EU approval (Boeing 1997: 1). The Commission accepted the final package of remedies offered by BMD, which addressed each of the EU’s competition concerns.^v Formal EU authorization of the merger came on July 30. The newly-merged BMD began operating on August 4 as the largest aerospace company in the world (Damro 2001: 215).

The BMD case provides useful evidence and insights regarding divergent decisions and political intervention. The case supports claims that politicians are likely to perceive divergent decisions as threats to national and/or constituent interests. Based on this perception, US politicians decided to intervene in the case. In addition, this case served as a valuable learning experience for many actors involved in the merger review process. While the Bilateral Agreement had been signed six years prior, the competition regulators’ experience at cooperating under the provisions was still limited and untested with respect to contentious and high-profile cases like BMD. As Parisi argues “some misunderstandings of the Agreement were reported, particularly during the course of the

[BMD] merger case... One such misconception was the assertion that, in a merger notified to both parties, one party ‘goes first’ while the other defers. This is clearly wrong... (1999: 137). Stark also noted the valuable lessons learned from BMD, noting that the “experience led the agencies on both sides to draw a deep breath and commit themselves to extra and sustained efforts to make the coordination process work as well as it possibly can” (2000: 5). These lessons were not lost on subsequent EU-US cooperation. In fact, after BMD, the US and EU competition regulators began exchanging information and discussing mergers sooner and more intensively in their respective review processes.^{vi}

After the BMD case, the EU and US competition regulators agreed the 1999 Administrative Arrangements on Attendance (AAA).^{vii} The AAA reflects the regulators’ perceived need to formalize and clarify procedures that were already taking place on an ad hoc basis under the Bilateral Agreement.^{viii} In their respective competition investigations, EU and US regulators often meet with the merging firms and third parties to collect information on business activity related to the merger. As a result of this previous experience, the Commission approached the US competition authorities to establish a clear framework for requesting attendance at each other’s meetings.

Based on the AAA, reciprocal exchanges of attendees became a common feature of the review process for concurrent jurisdiction competition cases. As Commissioner Monti argues ‘it has now become standard practice for representatives of the antitrust agencies to attend oral hearings in cases involving close EU-US cooperation—a virtually unprecedented step forward in EU-US regulatory cooperation’ (Monti 2001b: 3).

When requests for attendance are granted, the prevailing laws protecting confidential information in the host jurisdiction apply to the guest regulators. As such, the host competition authorities will typically consult with the merging firms before an arrangement for attendance is confirmed. Unless the firms have agreed to waive their right to confidentiality, guest competition regulators are asked to exit the meeting when confidential information is being discussed. As such, the AAA does not threaten domestic laws on confidential information and conforms to general business interests on both sides of the Atlantic. By simplifying the procedure for attendance into a standard practice, the AAA reduces information asymmetries and, again, reduces the likelihood that

competition regulators will reach divergent decisions.^{ix} By reducing the likelihood of divergent decisions, the AAA (like the Bilateral Agreement) also reduces the likelihood of political intervention.

In 1999, the EU and US also established the EU-US Mergers Working Group (MWG). This cooperative group is an ad hoc forum with flexible membership that is mandated to study different approaches in the EU and the US to the formulation of remedies and the scope for convergence of merger analysis and methodology. The MWG was created under the regulators' discretion with an agenda that can vary depending on regulatory needs for new areas of cooperation.

In 2002, the MWG established three sub-groups, one to deal with procedural issues and two others to deal with substantive issues on the conglomerate aspects of mergers and the role of efficiencies in merger analysis. These cooperative efforts resulted in the guidelines on Best Practices on Cooperation in Merger Investigations. The guidelines were issued 'with a view to minimising the risk of divergent outcomes, as in the BMD case, and to enhancing the good relationship developed over the last decade' (European Commission 2003: 5). The guidelines identify central objectives and four specific areas—coordination on timing, collection and evaluation of evidence, communication between the reviewing agencies and remedies/settlements—in which cooperation and convergence will reduce the likelihood of divergent decisions in individual merger cases.^x

In October 2011, the Federal Trade Commission, the Department of Justice Antitrust Division and the European Commission published revised best practices for cases where EU and US competition authorities were reviewing the same merger (US-EU Merger Working Group 2011). These new guidelines address four particular areas and indicate further areas for increasing cooperation and convergence. First, procedures for communications are to include early contacts, possible alignment of consultation timetables at key stages, and the designation of a contact person in the EU and US. Second, improvements on coordination of investigatory timing include encouraging merging parties to discuss and facilitate timings for submission, and actively warning merging parties against filing and gaining a decision in one jurisdiction before the other. Third, the collection and evaluation of evidence includes sharing of information during

the initial (pre-notification) stages, the discussion and coordination of information or discovery requests, and discussions with a view to receiving confidentiality waivers from the merging parties (and possibly third parties). Finally, regarding remedies and settlements, the new guidelines emphasise the need to avoid divergent decisions: ‘The reviewing agencies should strive to ensure that the remedies do not impose inconsistent or conflicting obligations on the parties’ (2011: 6).

To summarize, the EU and US have devised a series of agreements and initiatives over the past two decades in an effort to increase cooperation and convergence in ways that increase the likelihood of reaching similar merger decisions. The 1991 Bilateral Agreement was an important but insufficient first step, possibly because it did not foresee the impact that economic interdependence would have on international business during the 1990s, or the pace at which firms would respond to accelerated global competition. The 1999 AAA formalized cooperative procedures that regulators already had initiated following the Bilateral Agreement and, especially, after the BMD merger. At about the same time, the MWG was created in an effort to assess ongoing needs and areas for improvement, basically acknowledging that interdependence would accelerate merger activity and that US and European companies would be at the forefront of such activities. Finally, the 2011 best practices publications aimed to fine-tune data collection procedures and further improve cooperation between US and EU merger regulators.

The Process of Cooperation in Transatlantic Merger Relations

Under the cooperative framework discussed above, the EU and US competition authorities engage in behavior designed to reduce the likelihood of divergent decisions in individual merger cases. This behavior reflects the concern of the regulators that divergent decisions are typically perceived by politicians as likely to affect adversely their national and/or constituent interests (Damro 2006). If politicians form this perception in individual merger cases, their likelihood of intervening increases.

In general, the record of individual merger cases suggests that EU-US cooperation has met the challenge of economic interdependence. While official commentators on both sides of the Atlantic frequently declare the success of EU-US cooperation in merger review, former FTC Commissioner Robert Pitofsky argued early on that,

[I]t is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share, on a regular and continuing basis, views and information about particular transactions, coordinate the timing of our review process to the extent feasible, and almost always achieve consistent remedies (2000).

Beyond this general assessment, it is useful to investigate in greater detail the process through which actual EU-US cooperation takes place under the agreements identified in the previous section. The increasing information exchanges that occur through this process increase the likelihood of convergence in decisions. This process can be broken down into four stages: initial contacts, notification contacts, review process contacts, and remedial contacts.

Initial Contacts

Transatlantic cooperation takes place in merger cases that meet statutory thresholds found in the US's Hart-Scott-Rodino Act (HSR) and the EU's Merger Control Regulation (MCR). When mergers meet these thresholds, the firms must notify both the US and EU competition authorities of their intent to merge. Most EU-US cooperation occurs after the competition authorities have received such formal notifications from the firms. However, as detailed in the 2011 US-EU Merger Working Group best practice guidelines, cooperation may begin even before merging firms submit a formal notification to the respective competition authorities. The guidelines, in fact, encourage companies to take proactive steps, since "effective coordination between the US agencies and DG Competition depends to a considerable extent on the cooperation and goodwill of the merging parties" (2011: 2).

During the merger review process, EU and US competition authorities are in contact with each other on a daily basis via telephone calls, faxes, emails and face-to-face interactions (Janow 2000: 44). This is particularly true of lower-level case managers and handlers who focus on the economic and legal analysis of the merger review process.

During these contacts, individual case managers and handlers may, and often do, discuss pending mergers that have not yet been formally notified to one or both of the competition authorities. These discussions must avoid concrete details because the regulators take great care not to broach confidentiality requirements during such informal initial contacts.

Initial contacts can function as an early warning system for possibly divergent analyses between EU and US competition regulators. For example, in order to respect confidentiality requirements, EU and US competition authorities may engage in hypothetical discussions over market definitions and other analytical concepts of merger review that may apply to individual merger cases soon to be notified. By discussing market definitions and analytical concepts, even hypothetically, before receipt of the formal notification, the regulators can alert each other to the potential use of different approaches to evaluating a merger that could lead to divergent decisions. Of course, if the firms proposing a merger agree to waive their rights to confidentiality, initial contacts need not be limited to hypothetical discussions. The 2011 best practices encourage this, contending that “Agency cooperation is most effective when the merging parties and third parties allow the agencies to share information” (2011: 2). Further, the success of US-EU cooperation “depends on the active participation and cooperation of the merging parties and will be facilitated if the parties discuss timing with the reviewing agencies as soon as feasible after the parties inform the reviewing agencies of a merger that requires review by the US agencies and DG Competition” (2011: 4).

Initial contacts can significantly expand the competition regulators’ discretion because they allow information exchanges prior to opening the formal procedures for cooperation. Because regulators can discuss expected mergers and exchange information prior to the firms’ formal notification, initial contacts also increase discretionary flexibility regarding the strict statutory procedures (including formal deadlines) embodied in the HSR and MCR.

Notification Contacts

The next stage of cooperation is characterized by notification contacts. These notification contacts are typically formal, written exchanges between the competition

regulators. As such, they should not be confused with the formal notifications that merging firms are required to submit separately to the regulators pursuant to the HSR and MCR.

Notifications occur when one regulator informs the other that it is initiating a competition investigation that may affect interests in the foreign jurisdiction. These notification contacts are explicitly mentioned in the EU-US Bilateral Agreement and the Guidelines on Best Practices on Cooperation in Merger Investigations. The cooperation is triggered when merger review by one jurisdiction may affect the “important interests” of the other jurisdiction. Article II.2 of the Bilateral Agreement includes a number of circumstances that ordinarily trigger implementation cooperation, and “thereby give each party the opportunity to determine the extent to which its important interests might be affected” (Parisi 1999: 136). The notification stage consists of more than a brief statement that a proposed merger requires approval from multiple regulators. According to the 2011 best practices, “at the start of any investigation in which it appears that substantial cooperation between the US agencies and DG Competition may be beneficial, the relevant DOJ Section Chief or FTC Assistant Director and DG Competition Unit Heard...should seek to agree on a tentative timetable for regular inter-agency consultations, which takes into account the nature and timing of the merger” (2011: 3).

Review Process Contacts

Following the receipt of a formal EU-US notification, the competition regulators engage in a variety of cooperative contacts during their respective review processes. These review process contacts “can focus on any or all of the main issues likely to arise in the context of a merger investigation” (Monti 2001b: 2). Review process contacts include exchanges of information designed to reduce the likelihood of divergent decisions. More specifically, review process contacts frequently target substantive issues such as the definition of relevant product and geographic markets and the assessment of the likely competitive effects of the proposed merger on the relevant markets (European Commission 2000, 3). The best practices document proposes that “consultations are likely to be particularly useful at key stages of the investigation, including: (a) before the relevant US agency either closes an investigation without taking action or issues a second

request; (b) no later than three weeks after the European Commission initiates a Phase I investigation; (c) before the European Commission opens a Phase II investigation of clears the merger without initiating a Phase II investigation; (d) before the European Commission closes a Phase II investigation without issuing a Statement of Objections or before DG Competition anticipates issuing a Statement of Objections; (e) before the relevant DOJ section/FTC division make its case recommendation to senior leadership; (f) at the commencement of remedies negotiations with the merging parties; and (b) prior to a reviewing agency's final decision to seek to prohibit a merger" (2011: 3).

While review process contacts occur under the discretionary authority of the regulators, information exchanged during these contacts must respect the rights of confidentiality afforded to firms by domestic law. Competition regulators are very careful to respect relevant domestic statutes, which reduces the likelihood of political intervention. This feature of EU and US competition policies opens a potential avenue for firms to exert influence—by arguing for the maintenance of confidentiality—in concurrent jurisdiction merger reviews. The evidence suggests that firms have tried to avoid such controversy in recent years, since “confidentiality waivers have become routine practice in cases involving cooperation between DG Competition and the US agencies” (EU-US Mergers Working Group 2011: 6).

EU and US competition regulators do not typically make public comments regarding their respective review processes or transatlantic review process contacts. Rather, they prefer (and in some cases are legally required by domestic law) that their respective review processes and transatlantic review process contacts remain confidential until they are prepared to announce publicly whether or not to approve a proposed transaction. Earlier publicity can lead to unwanted politicization of the merger review process. As such, regulators are encouraged to address potential problems and political fallout through discreet discussions at the highest levels: “Consultations between the senior leadership of DG Competition and their counterparts in the US agencies may also be appropriate at any time. The senior leadership of the reviewing agencies should be kept informed of key milestones throughout the investigation” (EU-US Mergers Working Group 2011: 3-4).

Remedial Contacts

Remedial contacts occur when EU and/or US competition regulators determine that certain conditions will have to be met before final approval is granted to a proposed merger. While competition regulators may agree throughout the review process contacts, they may disagree on the precise nature of the remedies necessary for approval. Like the other stages of merger review, remedial contacts occur under the discretionary authority of the EU and US competition regulators.

As the Commission argues, EU-US cooperation via remedial contacts is specifically in the interest of the firms involved: “co-operation in the devising of remedies can help [firms] avoid ‘double-jeopardy’ whereby they are required to negotiate remedies sequentially, and thus have to make further concessions to the second agency to secure the clearance of a deal which has already received the blessing of the first” (European Commission 1999: 4.2). While remedial contacts are important for merging firms, their importance for competition regulators is fundamentally based in the fact that disagreements over remedies can lead to divergent decisions, which may prompt political intervention.

As with the other stages of merger review, the relationship between the competition regulators and merging firms is central to decreasing the likelihood of divergent decisions on remedies and settlements. The best practices guidelines make clear the essential role played by these different actors for increasing the overall effectiveness of cooperation in remedial contacts: “Cooperation is beneficial throughout the remedial process. Cooperating on the design of possible remedies may result in a single proposal for a remedial package to address concerns of both reviewing agencies... As effective cooperation... will depend significantly on the timing and the content of the merging parties’ proposals, the merging parties have an important role in enabling meaningful cooperation between the reviewing agencies” (EU-US Mergers Working Group 2011: 7).

While EU and US regulators have made great progress in enhancing cooperation and convergence across the four stages of the merger review process, it is worth noting that some challenges still remain. Perhaps most important among the challenges are the obstacles created by institutional differences in domestic EU and US competition policies. For example, EU and US competition regulators may prioritize different

substantive objectives in their respective competition investigations, which can increase the likelihood of divergent decisions in concurrent jurisdiction competition cases. In practice, they can lead to substantive divergences in the definition of relevant product and/or geographic markets, which can result in dramatically divergent market analysis calculations and, ultimately, divergent competition decisions. Similarly, procedural differences embedded in domestic EU and US competition policies—such as different timetables for competition investigations, different evidence-gathering tools and different roles for the judiciary—can impede the transatlantic coordination of competition investigations (Damro 2005).

Despite these domestic institutional differences in EU and US competition policies, some signs of convergence are emerging. Substantively, the overwhelming majority of transatlantic regulatory decisions in individual concurrent jurisdiction competition cases are convergent. Procedurally, limited convergence is also occurring. For example, the MWG’s work in the area of merger remedies has already produced practical results. Through the MWG, the Commission received useful comments from US competition authorities on a preliminary draft of its notice on remedies.^{xi} Commissioner Monti was candid in commenting on lessons learned from the US and the role of the MWG in the EU’s preparation of this notice:

“I have no hesitation in acknowledging that the Commission’s approach to remedies as set out in the Notice was influenced by the FTC’s previous study on the divestiture process, which demonstrated that some remedies secured by the FTC had proved less effective than intended. Furthermore, the EU and US antitrust authorities discussed their respective approaches to remedies within the framework of a working group on merger control [i.e., the MWG]. The exchange of expertise in this group proved invaluable to the drafting of our Notice on remedies” (2002: 2).

In addition to the successful convergence in the EU’s Notice on Remedies (European Commission, 2002; Monti, 2002), the MWG has also been credited with contributing to the US decision to publish the motivation of its decisions not to challenge

certain relevant actions (Monti, 2004; USDoJ, 2002). This evidence of convergence is notable in that it is not coercive or unidirectional, rather it follows from ‘a mutual learning process based on mutual experience’ (Damro 2011: 424). In addition, both of these instances of convergence occurred in areas under the discretionary authority of the competition regulators, not a change to the non-discretionary statutes governing competition policy.

Conclusions

This article has provided an analysis of US and EU efforts to promote cooperation in merger policy. Economic interdependence has prompted EU and US regulators to engage in extensive and intensive cooperation in the implementation of merger reviews that affect both jurisdictions concurrently. This cooperation is undertaken primarily to enhance information acquisition and reduce the likelihood of divergent decisions. A cooperative framework of negotiated agreements and ad hoc working groups, along with increasing cooperation across a number of practical stages of the merger review process—initial contacts, notification contacts, review process contacts and remedial contacts—has resulted in convergence in decisions and procedures, which has increased certainty and minimized political intervention and tensions. While different types of convergence have contributed substantially to increasing cooperation in transatlantic merger relations, there do remain important differences in EU and US merger rules. The extent to which further cooperation can overcome these differences will largely be determined by the work of the EU-US Mergers Working Group and the supporting contributions of merging firms in individual investigations and the negotiated framework more generally.

The article argues that the EU and US regulators have a preference to make decisions (even divergent decisions) in merger review in accordance with their statutory mandates and without political intervention. In the words of former Commissioner Monti, such decisions should be “a matter of law and economics, not politics” (European Commission 2001). Thus, the efforts of transatlantic cooperation should be viewed in the wider context of economic interdependence, insofar as market-based competition pushes regulators to provide some degree of certainty in rulings to enable businesses to make

strategic decisions with a level of confidence that regulatory outcomes will not diverge across legal jurisdictions.

The research in this article would usefully contribute to further work in several related areas. The first is cooperation in other areas of competition policy. M&As are an important part of competition policy, but so too are state aid and anti-competitive practices (e.g., cartels and price-fixing). US-EU cooperation is less developed in these areas, so an important area of research is to understand the factors that may have limited cooperation and convergence in these areas.

Second, this article is concerned mainly with cooperation outputs, such as agreements, working groups, and formal policies. We have not investigated in depth the inputs, specifically the roles that certain actors play in this process. Companies, legislatures, national governments, and regulatory bodies themselves have their own interests in seeing certain forms of merger cooperation institutionalized – or not. Certainly, more work should be done to determine the influence of these various actors and to explain how and why cooperation takes the form that it does.

Finally, the US and EU are not the only merger regulators that matter. With the rise of emerging markets throughout the world, companies often need to seek M&A approval from national regulators in, for example, Asia and Latin America. Cooperation among these other jurisdictions is not nearly as institutionalized as in the transatlantic relationship, and it is not at all clear how this process will unfold with and among other countries.

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ⁱ For earlier examples of this cooperative trend, see Fox (2007); Barnett (2006); Monti (2004, 2001a); Pate (2004); James (2002, 2001); Schaub (2002); Melamed (2000); Gerber (1999). Regarding the occasional disputes, for a recent case of disagreement see the Sun-Oracle merger (2009).

ⁱⁱ For a thorough analysis of the content of the Bilateral Agreement, see Ham (1993).

ⁱⁱⁱ More detailed reports of the substantive issues of the merger and the divergent analyses taken by the EU and US can be found in Damro (2001), Boeder (2000), ICPAC (2000), Van Miert (2000), Karpel (1998), Peck (1998), Fox (1997) and Snyder (1997).

^{iv} H.R. Res. 191, 105th Cong. (1997), 143 Cong. Record 5550 (1997); S. Res. 108, 105th Cong. (1997), 143 Cong. Record 7609 (1997).

^v For the exact remedies, see Boeing (1997).

^{vi} This is not to claim that the cooperative framework was perfected following the lessons learned from BMD. For example, the GE-Honeywell merger (2001) is often identified as a subsequent case in which cooperation was less than perfect (Morgan and McGuire 2004).

^{vii} In 1998, the EU and US also signed a Positive Comity Agreement to clarify how positive comity should work in practice. Because domestic EU and US laws require competition regulators to initiate investigations into mergers that meet certain thresholds, the PCA does not apply to merger cases.

^{viii} Indeed, the EU allowed US competition officials to attend EU oral hearings as observers in the BMD case.

^{ix} However, reciprocal attendance does not guarantee convergent decisions. For example, see the 1999 BOC/Air Liquide merger.

^x For more on the MWG, see Damro (2011).

^{xi} Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001. pp. 3-11.